ARAS JALINAN SDN BHD

v.

TIPCO ASPHALT PUBLIC COMPANY LTD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
BADARIAH SAHAMID JC
[ORIGINATING SUMMONS NO: D3-24-69-2008]
9 MAY 2008

ARBITRATION: *Agreement - Jurisdiction of court - Injunction - Whether High Court had jurisdiction to grant injunctive relief in respect of matters where seat of arbitration was outside Malaysia - Federal law - Inherent or residual powers - Whether agreement could confer jurisdiction - Remedy - Intention of Parliament*

CONSTITUTIONAL LAW: *Courts - Jurisdiction of High Court - Injunction - Whether High Court had jurisdiction to grant injunctive relief in respect of matters where seat of arbitration was outside Malaysia - Federal law - Inherent or residual powers - Whether agreement could confer jurisdiction - Remedy - Intention of Parliament*

CIVIL PROCEDURE: *Injunction - Arbitration - Jurisdiction of High Court - Whether High Court had jurisdiction to grant injunctive relief in respect of matters where seat of arbitration was outside Malaysia - Federal law - Inherent or residual powers - Whether agreement could confer jurisdiction - Remedy - Intention of Parliament*

CIVIL PROCEDURE: *Jurisdiction - High Court - Injunction - Whether High Court had jurisdiction to grant injunctive relief in respect of matters where seat of arbitration was outside Malaysia - Federal law - Inherent or residual powers - Whether agreement could confer jurisdiction - Remedy - Intention of Parliament*

This was an application by the plaintiff for an injunction that pending determination of arbitration between the plaintiff and the defendants pursuant to cl. 25 of a settlement agreement dated 11 January 2008 between them: (i) the defendants be restrained from preventing the plaintiff from obtaining 50% shares in the 3rd defendant, including the 12,350,000 shares referred to in cl. 4.1 of the settlement agreement; and (ii) the defendants be restrained from appointing new directors for the 3rd defendant, either through an Extraordinary General Meeting of the 3rd defendant that was scheduled on 14 March 2008 or otherwise. The

defendants raised a preliminary objection on jurisdiction. Their position was that as the seat of arbitration was in Singapore, the plaintiff must seek relief from the Singapore courts since the Malaysian courts have no jurisdiction in the matter. The fundamental issue requiring determination was whether this court had jurisdiction, either statutory or inherent, to grant injunctive relief in respect of matters where the seat of arbitration was outside Malaysia.

Held (dismissing the application):

(1) Jurisdiction of the High Courts is governed by art. 121(1) of the Federal Constitution. Therefore, in order to determine the powers and jurisdiction of the High Courts in the instant matter, reference must be made to the respective federal law, which in this instance was the Arbitration Act 2005 ('Act'). However, the High Court had not been expressly provided under the Act or any federal law with the jurisdiction to grant the relief sought by the plaintiff. Further, on the basis of the established case authorities, the High Court had no inherent or residual powers to intervene in arbitration matters where the seat of jurisdiction was outside Malaysia. It was also clear that such jurisdiction could not be conferred by the agreement of the parties, whether as a specific clause in an arbitration agreement or as an article under the UNCITRAL Model Law on International Commercial Arbitration ('Model Law') incorporated into the aforesaid agreement. The plaintiff, however, was not without remedy. His recourse was the Singapore courts, where the seat of arbitration was situated. The Singapore courts have jurisdiction under s. 12(7) read with s. 12(1) of the Singapore International Arbitration Act 1994. The plaintiff's arguments that since the defendants were Thais any order granting the plaintiff injunctive relief would be ineffective against the defendants could not be accepted. As the parties had already agreed to have the matter arbitrated in Singapore, the Singapore courts would be the more effective forum. Recourse to courts of the chosen forum would also reinforce the intention of the parties to submit their disputes to a forum that was neutral to them. In conclusion, Parliament, at some point, may in its wisdom adopt the equivalent of art. 1(2) of the Model Law to expressly provide for the jurisdiction is outside Malaysia by setting out clear parameters of the court's power to grant, *inter alia*, injunctive

relief as well as assistance in enforcing arbitral awards, along the lines adopted by jurisdictions that have similarly adopted the Model Law as its basis. As it stood, the intention of Parliament was clear. Such jurisdiction was not provided for under the Act or in any other statute, and it was not for the courts to clothe themselves with powers where none had been conferred by Parliament. To do so would be a transgression of legislative power. This matter also did not fall within the realm of matters where inherent or residual powers of the court may be invoked. Thus, this court lacked the jurisdiction to grant the relief sought by the plaintiff. *Innotec Asia Pacific Sdn Bhd v. Innotec GMBH* (not foll); *Channel Tunnel Group Ltd & Anor v. Balfour Beatty Construction Ltd & Ors* (dist); *Bhatia International v. Bulk Trading SA & Anor* (not foll); *PP v. Kok Wah Kuan* (foll); *Sarawak Shell Bhd v. PPES Oil & Gas Sdn Bhd* (foll). (paras 17, 18, 39, 50, 51, 54 & 56)

Case(s) referred to:

Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd [1920] 28 CLR 129 ***(refd)***

Connelly v. DPP [1964] AC 1254 ***(refd)***

Bhatia International v. Bulk Trading SA & Anor AIR [2002] 1432 ***(not foll)***

Bina Jati Sdn Bhd v. Sum Projects (Brothers) Sdn Bhd [2002] 1 CLJ 433 CA ***(refd)***

Channel Tunnel Group Ltd and Another v. Balfour Beatty Construction Ltd and Others [1993] AC 335 ***(dist)***

Innotec Asia Pacific Sdn Bhd v. Innotec GMBH [2007] 8 CLJ 304 HC ***(not foll)***

ISC Technology Sdn Bhd v. Premium Systems Technology Pte Ltd [2008] 7 CLJ 239 HC ***(refd)***

Inter Maritime Management Sdn Bhd v. Kai Tai Timber Company Ltd [1995] 4 CLJ 164 CA ***(refd)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***

Mitsui Engineering & Shipbuilding Co Ltd v. Easton Graham Rush & Anor [2004] SGHC 26 ***(refd)***

PP v. Kok Wah Kuan [2007] 6 CLJ 341 FC ***(foll)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Sarawak Shell Bhd v. PPES Oil & Gas Sdn Bhd & Ors [1998] 3 CLJ 275 CA ***(foll)***

Tan Beng Sooi v. Penolong Kanan Pendaftar (United Merchant Finance Bhd Intervener) [1995] 2 CLJ 846 HC ***(refd)***

The Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp Ltd [1981] 1 Lloyd's Rep 253 ***(refd)***

Western Oil Sands v. Allianz Insurance Company of Canada [2004] ABQB 79 ***(refd)***
Winerich Sdn Bhd v. Alpha Atlas Management Sdn Bhd [2003] 7 CLJ 259 HC ***(refd)***
Zainal Abidin Hj Abdul Rahman v. Century Hotel Sdn Bhd [1982] 1 LNS 34 FC ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 3(2)(b), (3)(b), (4), 8, 10, 11, 51(1)
Courts of Judicature Act 1964, ss. 23(2), 25
Federal Constitution, art. 121(1)
Interpretation Act 1948 and 1967, s. 3
Rules of the High Court 1980, O. 92 r. 4

Arbitration Act 1996 [NZ], s. 7
Arbitration Act 1950 [UK], s. 12(6)(b), (h)
International Arbitration Act 1994 [Sing], s. 12(1), (7)
Supreme Court Act 1981 [UK], s. 37(1)
Supreme Court of Judicature (Consolidation) Act 1925 [UK], s. 45
UNCITRAL Model Law on International Commercial Arbitration, arts. 1(2), 5, 9

For the plaintiff - Dhinesh Bhaskaran (SY Liew with him) M/s Shearn Delamore & Co
For the defendant - Lim Chee Wee (Patricia Woo & Kua Lay Theng with him); M/s Skrine

Reported by Suresh Nathan

JUDGMENT

Badariah Sahamid JC:

[1] Enclosure 1 before me is an application by the plaintiff for an injunction that pending determination of arbitration between the plaintiff and the defendants pursuant to cl. 25 of the settlement agreement dated 11 January 2008 between the plaintiff and the defendants:

(a) The defendants be restrained from preventing the plaintiff from obtaining 50% shares in the 3rd defendant including the 12,350,000 shares referred to in cl. 4.1 of the settlement agreement dated 11 January 2008 between the plaintiff and the defendants; and

(b) The defendants be restrained from appointing new directors for the 3rd defendant, either through an EGM of the 3rd defendant which is scheduled on 14 March 2008 or otherwise.

[2] The originating summons before me raises the very significant issue of whether Malaysian courts have jurisdiction in matters where the seat of arbitration is outside Malaysia? The Arbitration Act 2005 ("the Act") is silent on the matter. Must jurisdiction in such circumstances be statutorily provided or can there be recourse to the inherent jurisdiction of the courts? The matter before me also involves attempting to construe the intention of Parliament in the enactment of the Arbitration Act 2005. To date the only local authority on the matter is the case of *Innotec Asia Pacific Sdn. Bhd. v. Innotec GMBH* [2007] 8 CLJ 304. The task of navigating in largely uncharted waters such as these presents this court with the opportunity to address several important issues raised by the Act.

Summary Of Facts

The Settlement Agreement

[3] The plaintiff and the 1st and 2nd defendants are shareholders of the 3rd defendant. The plaintiff and the third defendant are Malaysian companies. The 1st and 2nd defendants ("the Tasco group") are Thai companies. The 2nd defendant is wholly owned by the 1st defendant. *Vide* a loan agreement dated 15 January 2007, the 2nd defendant granted a loan to the plaintiff. The plaintiff utilized the said loan to finance another company, MSSB for the purpose of acquiring 24.7 million Redeemable Convertible Preference Shares (RCPS) in the 3rd defendant. On 3 December 2007, the 1st defendant instituted winding up proceedings in the Kuala Lumpur High Court against the 3rd defendant for an alleged debt owed by the 3rd defendant pursuant to an agreement to supply oil between the 1st and the 3rd defendant. On 11 January 2008, the plaintiff, 1st defendant, 2nd defendant and the 3rd defendant entered into a settlement agreement. Pursuant to the terms thereof, the plaintiff, the 1st, 2nd and 3rd defendant agreed that the plaintiff on payment of RM63,650,001 on or before 31 March 2008 would acquire 50% shares in the 3rd defendant. The outcome of the agreement is that the management of the 3rd defendant would be shared equally between the plaintiff and the 1st and 2nd defendant. The relevant terms of payment agreed under the settlement agreement are *inter alia* as follows:

A (1) Payment of RM19 million on 11 January 2008;

(2) To ensure that the plaintiff is registered as the sole shareholder of MSSB after the conversion of RCPS shares of the 3rd defendant owned by MSSB to ordinary shares of the
B 3rd defendant;

(3) To transfer all shares in MSSB to the plaintiff after execution of the settlement agreement and payment in the sum of RM19 million is received;

C (4) Payment of RM5 million on/before 28 February 2008;

(5) Payment of RM7,350 million on/before 31 March 2008;

(6) Payment of RM950,001 for the purchase of ordinary shares of the 2nd defendant on/before 31 March 2008; and
D

(7) Payment of RM6,650,000 for the purchase of ordinary shares of 2nd defendant on or before 31 March 2008.

[4] The plaintiff paid the first RM19 million on 11 January 2008.
E The following payment of RM5 million was due on 28 February 2008. However the plaintiff, alleging a technical error in the remittance of payment, made payment on 3 March 2008 instead of the scheduled date of 28 February 2008. Meanwhile on 29 February 2008 the 1st defendant issued a notice to the plaintiff
F that the plaintiff had breached cl. 4.1.1 of the settlement agreement and therefore the 1st defendant claimed entitled to exercise its rights under cl. 6.4 and 6.6 of the settlement agreement in respect of control and management of the 3rd defendant. On the same day the 1st and 2nd defendant then
G issued a notice to convene an Extraordinary General Meeting (EGM) of the 3rd defendant to be held on 14 March 2008 to appoint additional directors in the 3rd defendant. This would result in the 1st and 2nd defendants taking over management and control of the 3rd defendant. The plaintiff on 3 March 2008
H requested that the scheduled EGM be cancelled since payment of the outstanding RM5 million had already been made. The 1st defendant refused to accept payment of the RM5 million and indicated its intention to proceed with the scheduled EGM. The plaintiff alleges that the conduct of the 1st defendant is contrary
I to the settlement agreement and is *mala fide* as the motive of the

1st defendant was to take over the control and management of the 3rd defendant. Hence the plaintiff's application before me for an injunction in encl. 1.

Arbitration Clause

[5] The settlement agreement contained an arbitration clause which provides as follows:

Clause 25 Arbitration

> 25.1 Any dispute arising out of or in connection with this Agreement shall be referred to and finally settled by arbitration under the Rules of the International Chamber of Commerce which rules are deemed to be incorporated by reference into this arbitration clause.
>
> 25.2 The number of arbitrators shall be three (3), one to be appointed jointly by TASCO and TBC (Thai Bitumen Co. Ltd.), one to be appointed by AJSB (Aras Jalinan Sdn. Bhd.) and the third, who shall be the Chairman, shall be appointed by the two (2) appointed arbitrators.
>
> 25.3 The place of arbitration shall be in Singapore.
>
> 25.4 The language to be used in the arbitral proceedings shall be English.
>
> 25.5 The arbitration and the award shall be considered as international and the award shall be enforced in Malaysia pursuant to the provisions of the Convention on the Recognition of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958 or such applicable laws pertaining to enforcement of arbitral awards.
>
> 25.6 This clause does not preclude the making of an application to any courts for injunctive or other interim relief.

Originating Summons (encl. 1)

[6] At the initial *inter partes* hearing before me the learned counsel for the defendants raised a preliminary objection on jurisdiction. The defendant's position is that since the seat of arbitration is in Singapore, the plaintiff must seek relief from the Singapore courts as the Malaysian courts have no jurisdiction in the matter. The plaintiff disagreed. At the plaintiff's request I

granted an *ad interim* injunction of the above (a) and (b) prayers, pending hearing of the plaintiff's originating summons. The parties agreed that they would focus their oral arguments and written submissions on the preliminary issue of jurisdiction of the High Court in the instant matter.

Issue

[7] The fundamental issue before the court may be summarized thus:

Does this court have jurisdiction, whether statutory or inherent to grant injunctive relief in respect of matters where the seat of arbitration is outside Malaysia?

Plaintiff's Submissions

[8] The plaintiff contends that Malaysian courts have jurisdiction even in matters where the seat of arbitration is outside Malaysia. The crux of the plaintiff's argument may be summarized as follows:

(1) *Act Does Not Exclude Jurisdiction*

There are no express provisions in the Act which exclude or limit the jurisdiction of the court to grant injunctive relief in matters where the seat of arbitration is outside Malaysia. Thus the Malaysian courts are presumed to have jurisdiction. Plaintiff counsel referred to the case of *Innotec Asia Pacific Sdn. Bhd v. Innotec GMBH* [2007] 8 CLJ 304 where a similar issue was raised before Ramly Ali J in respect of s. 10 of the Act which deals with the power of the court to grant a stay of proceedings pending arbitration. In *Innotec*'s case the seat of arbitration was in Germany. The learned judge was of the view that the court had jurisdiction in the matter by reason of such jurisdiction not being expressly excluded by the Act. According to Ramly Ali J:

> For there to be an exclusion of jurisdiction, express legislative provision to that effect must be enacted. An exclusion of jurisdiction necessarily compromises the right of access to justice and as such must be categorically provided for.

The plaintiff's counsel also referred to the English case of *Channel Tunnel Group Ltd and Another v. Balfour Beatty Construction Ltd and Others* [1993] AC 335 where the House of Lords held that English courts have jurisdiction to grant

injunctive relief pending a foreign arbitration, notwithstanding that s. 12(6)(h) of the English Arbitration Act 1950 did not apply to foreign arbitrations. Reference was also made to the case of *Bhatia International v. Bulk Trading SA and another* [2002] AIR 1432 where the Indian Supreme Court interpreted that under the Indian Arbitration and Conciliation Act 1966 there was power to grant injunctive relief in respect of foreign arbitrations.

(2) *Inherent Jurisdiction*

There is an inherent jurisdiction to grant injunctive relief in the interests of justice. This is a separate and distinct source of jurisdiction from statute. Order 92 r. 4 is an affirmation of the residual powers of the court. The plaintiff cited as authority the case of *Bina Jati Sdn Bhd v. Sum Projects (Brothers) Sdn Bhd* [2002] 1 CLJ 433 where the Court of Appeal held that the High Court can invoke its inherent powers under O. 92 r. 4 of RHC 1980 to intervene in arbitration proceedings.

(3) *Agreement Of Parties*

Parties have agreed that recourse to injunctive relief may be applied to any courts. Article 23 para. 2 of the Rules of Arbitration of the International Chamber of Commerce (which are deemed incorporated into cl. 25 of the settlement agreement) expressly provides that "the parties may apply to any competent judicial authority for interim or conservatory measures". The article does not restrict the application to courts situated in the seat of arbitration. Clause 25.6 of the settlement agreement states that the arbitration clause "does not preclude the making of an application to any courts for injunctive or other interim relief."

(4) *Assistance of courts*

The jurisdiction of the court to grant injunctive relief will not encroach on the powers of arbitrators, and is compatible with art. 9 of the UNCITRAL Model Law on International Commercial Arbitration which states that "it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure". This is not limited to courts situated in the seat of arbitration. A refusal of Malaysian courts to grant relief would

reflect poorly on the country's willingness to give effect to our treaty obligations under the New York Convention and will result in Malaysia being known as "arbitration unfriendly".

(5) *Prejudice to plaintiff*

Recourse to Singapore courts would be ineffective as none of the defendants are Singaporeans and may breach any order of the Singaporean court with impunity. This would render the plaintiff's right nugatory.

The Defendant's Reply

[9] The 1st and the 2nd defendants' reply may be summarized thus:

(1) *Jurisdiction to be statutorily provided*

The jurisdiction of the High Court has to be construed in accordance with art. 121(1) of the Federal Constitution which stipulates that such jurisdiction must be expressly provided by Federal law. The authority referred to in support is the Federal Court decision of *PP v. Kok Wah Kuan* [2007] 6 CLJ 341. The relevant Federal law here is the Arbitration Act 2005. There are no express provisions in the Act that confer jurisdiction on Malaysian courts to grant injunctive relief in matters where the seat of arbitration is outside Malaysia. Section 3 which provide for categories of arbitrations where the Act applies, makes no mention of jurisdiction of the courts where the seat of arbitration is outside Malaysia. In addition s. 8 excludes any other form of court intervention save as expressly provided by the Act.

The provisions of the Courts of Judicature Act 1964 similarly do not confer jurisdiction on the courts to grant injunctive relief in respect of any arbitration proceedings, whether the seat of arbitration is within or outside Malaysia. Section 23(2) of the abovementioned Act provides as follows:

> Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction.

According to defendant counsel, *Channel Tunnel* is not good authority as it may be distinguished from the instant case. In the *Channel Tunnel* case, the House of Lords derived jurisdiction of the English courts to grant injunctive relief in respect of foreign arbitration not from the English Arbitration Act of 1950, but by virtue of s. 37(1) of the English Supreme Court Act 1981. The English Supreme Court Act 1981 is wider than the equivalent provision in our Courts of Judicature Act 1964.

Defendant counsel disagreed with *Bhatia*'s case where the Indian Supreme Court found jurisdiction for court intervention in arbitration matters although such jurisdiction was not statutorily provided for under the Indian Arbitration and Conciliation Act 1996. *Bhatia*'s case, according to defendant counsel should not be followed as the decision has been criticized as re-writing the abovementioned Indian Act and transgressing into the territory of the Legislature. (OP Malhotra in *The Law and Practice of Arbitration and Conciliation: The Arbitration and Conciliation Act 1996* (1st edn. Lexis-Nexis Butterworth). Thus, it was contended, *Channel Tunnel* and *Bhatia*'s case must be read with caution and distinguished from the instant case.

The defendant counsel also distinguished *Innotec*'s case on the grounds that the aforementioned case dealt with s. 10 of the Act, while the instant case dealt primarily with ss. 3 and 8 of the Act.

The Act has omitted art. 1(2) of the Model Law which provides that art. 9, the equivalent of our s. 11 of the Act is not limited to domestic arbitrations. Parliament by deliberately excluding art. 1(2) did not intend for the provision in art. 1(2) to apply.

(2) *No inherent jurisdiction*

Section 8 of the Act excludes any inherent powers of the court to intervene in arbitrations where it is not expressly provided for under the Act.

In *Sarawak Shell Bhd v. PPES Oil & Gas Sdn Bhd & Ors* [1998] 3 CLJ 275 Mahadev Shankar, JCA took the position that the High Court had no non statutory power, whether inherent or by common law to intervene in arbitrations. The

Court of Appeal approved of and followed the House of Lords decision of *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp. Ltd* [1981] 1 Lloyd's Rep 253 which held that the supervisory jurisdiction exercised by the English courts with respect to arbitration is not derived from an inherent but statutory power.

In defendant counsel's opinion, O. 92 r. 4 of the Rules of the High Court 1980 cannot be construed as the source of the court's inherent jurisdiction in the aforesaid matter. Thus the *dicta* in *Bina Jati* should not be followed.

(3) *Agreement cannot confer jurisdiction*

Parties cannot by private agreement in contract confer jurisdiction on a court. Clause 25.6 of the settlement agreement which states that," this cl. 25 does not preclude the making of an application to any courts for injunctive or other interim relief", cannot confer jurisdiction on a court. (Authorities: *Inter Maritime Management Sdn. Bhd v. Kai Tai Timber Company Ltd* [1995] 4 CLJ 164; *ISC Technology Sdn. Bhd. v. Premium Systems Technology Pte. Ltd* [2008] 7 CLJ 239.

(4) *Non intervention of Malaysian courts*

Even if the court has jurisdiction, the court should adopt a less interventionist approach where there is an arbitration agreement, as this would encroach into the powers of the arbitrators. The plaintiff and the 1st and 2nd defendants who are of different nationalities-Malaysian and Thai have specifically agreed on a neutral venue (Singapore) to resolve their disputes. To allow the Malaysian plaintiff injunctive relief from a Malaysian court would be unfair to the Thai defendants and would be contrary to international commercial arbitration.

(5) *Plaintiff has recourse to Singapore courts*

The plaintiff's remedy is with the Singapore High Court. The Singapore court has jurisdiction under s. 12(7) read with s. 12(1) of the International Arbitration Act to grant relief in an international arbitration whether pending or contemplated. It represents an effective forum, notwithstanding that the defendants are Thais as the seat of arbitration itself is situated in Singapore.

Grounds Of Decision

[10] After lengthy oral and written submissions of both learned counsels and careful consideration of relevant authorities, I am of the opinion that the High Court in Malaysia has no jurisdiction, statutory or inherent or by the exercise of residual powers to grant injunctive relief in matters where the seat of arbitration is outside Malaysia.

[11] I therefore dismiss the plaintiff's application for an injunction in encl. (1) with costs. Bearing in mind the significance and far reaching implications of my decision, I allowed the plaintiff's oral application for an Erinford injunction of 21 days in order to enable the plaintiff to file an urgent appeal to the Court of Appeal.

[12] The grounds of my decision are as follows:

Introduction

The Arbitration Act 2005

[13] As a starting point I consider it necessary and useful to review briefly the historical evolution of the Arbitration Act 2005 as it provides the backdrop and historical context of the Act and may shed some light into what is referred to as 'the intention of Parliament', which this court is asked to construe.

[14] The 'Explanatory Statement' to the Arbitration Bill 2005 provided as follows:

> This Bill seeks to reform the law relating to domestic arbitration, provide for international arbitration, the recognition and enforcement of awards and for related matters. It seeks to promote international consistency of arbitral regimes based on the Model Law adopted by the United Nations Commission on International Trade Law on 21 June 1985.

[15] The Arbitration Act 2005 came into effect on 15 March 2006. The Act repealed the Arbitration Act 1952. The repealed Act had been based primarily on the English Act of 1950. In enacting the current Act, the option was either to retain its English genealogy by incorporating the changes brought about by the English Arbitration Act of 1996 or to adopt an arbitral regime based on the UNCITRAL Model Law on International Commercial Arbitration, which was adopted by the United Nations

Commission on International Trade Laws on 21 June 1995 (also referred to as "Model Law"). Another issue that was raised was whether there should be two separate Acts, one based on the English Arbitration Act 1996 for domestic arbitrations and the other based on Model Law for international arbitrations, or one single Act to encompass both domestic as well as international arbitrations.

[16] After deliberation and consultation with relevant parties the Attorney General's Chambers decided to enact a single Act based on Model Law. The rationale was briefly, to have a single reference point for both domestic and foreign arbitrations as well as to promote consistency between international and domestic arbitral regimes. The rationale underlying Model Law is to set the parameters within which courts have jurisdiction to assist or supervise arbitration, as well as to support party autonomy in international commercial arbitration. The move from the 'English model' to Model Law also reflects an appreciation of the need to adopt an arbitral regime that reflects worldwide consensus on principles and practices of international arbitration. It is with the above in mind, that I arrive at the following determination:

Jurisdiction To Be Expressly Provided

[17] Jurisdiction of the High Courts is governed by the Federal Constitution. According to art. 121(1) of the Federal Constitution, the two High Courts 'shall have jurisdiction and powers as may be conferred by or under federal law'. Therefore in order to determine the powers and jurisdiction of the High Courts in the instant matter, reference must be made to the respective federal law. This was affirmed by Abdul Hamid FCJ (as he then was) in his majority judgment in the recent Federal Court decision of *PP v. Kok Wah Kuan* [2007] 6 CLJ 341 (FC), law. According to s. 3 of the Interpretation Act 1967 the term 'federal law' means 'an Act of Parliament, and any other law in force in Malaysia or any part thereof which relates to a matter with respect to which Parliament has power to make laws.'

[18] The federal law here refers to the Arbitration Act 2005. The Preamble of the Act provides:

> An Act to reform the law relating to domestic arbitration, provide for international arbitration, the recognition and enforcement of awards and for related matters.

[19] Thus in its preamble the Act clearly encompasses domestic and foreign arbitrations. Section 3 of the Act lays down provisions on the applicability of the Act to be as follows:

1. Application to arbitrations and awards in Malaysia

(1) This Act shall apply throughout Malaysia.

(2) In respect of a domestic arbitration, where the seat of arbitration is in Malaysia:

(a) Parts I, II and IV of this Act shall apply; and

(b) Part III of this Act shall apply unless the parties agree otherwise in writing.

(3) In respect of an international arbitration, where the seat of arbitration is in Malaysia:

(a) Parts I, II and IV of this Act shall apply; and

(b) Part III of this Act shall not apply unless the parties agree otherwise in writing.

(4) For the purpose of paras. (2)(b) and (3)(b), the parties to a domestic arbitration may agree to exclude the application of Part III of this Act and the parties to an international arbitration may agree to apply Part III of this Act, in whole or in part.

[20] The abovementioned provisions refer specifically to two broad categories of arbitrations and awards to which the Act applies: By virtue of 3(2), in respect of a domestic arbitration where the seat of arbitration is in Malaysia and in 3(3), in respect of an international arbitration where the seat of arbitration is in Malaysia. In short the Act applies to domestic and international arbitrations where the seat of arbitration is in Malaysia. The Act is silent on a third category, *viz*. in respect of an international arbitration where the seat of arbitration is outside Malaysia. The specific reference to the abovementioned categories of arbitrations to which the Act applies suggests that the Act does not apply in any other circumstance.

[21] This is strengthened by s. 8 of the Act which excludes any other form of court intervention save as expressly provided by the Act. The abovementioned section provides as follows:

8. Extent of Court Intervention

> Unless otherwise provided, no court shall intervene in any matters governed by this Act.

[22] What is the meaning of the words "unless otherwise provided"? In my opinion this provision clearly stipulates that any assistance or supervision of the courts must be expressly provided, either under the Act or other relevant statute. Consequentially, power of intervention by courts may not be inferred, either from the invocation of inherent or residual common law powers, or by an inference that what is not expressly forbidden is permissible.

[23] I find support to the above in the well established principle of the construction of statutes that the plain language of a statute must be given effect.

[24] Augustine Paul FJ in the Federal Court decision of *Metramac Corporation Sdn. Bhd. v. Fawziah Holdings Sdn. Bhd* [2006] 3 CLJ 177 held that in construing specific provisions of the Courts of Judicature Act 1964, emphasized that when the language used in a statute is clear, effect must be given to it. His Lordship cited with approval the observation of Higgins J in *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* [1920] 28 CLR 129 at pp 161-162:

> The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense it is our duty to obey that meaning even if we think the result to be inconvenient, impolite or improbable.

[25] The repeal of the Arbitration Act 1952 and the enactment of the current Act clearly indicate a deliberate intention to move away from the English model to Model Law. Had Parliament intended, it would have incorporated art. 1(2) of Model Law or the equivalent s. 7 of the Arbitration Act of New Zealand 1996. The New Zealand Act provides which sections, if any are applicable to foreign arbitrations. New Zealand is one example of a jurisdiction that has adopted Model Law and the relevant Article to confer express jurisdiction to courts where the seat of

arbitration is foreign. As Parliament has chosen to adopt the arbitral regime of Model Law but not adopted art. 1(2) of Model Law, the inescapable conclusion is that there is no intention of Parliament to confer such jurisdiction.

[26] Section 8 is similar to art. 5 of Model Law which provides "in matters governed by this law, no court shall intervene except where so provided in this law". It is important to appreciate the rationale behind s. 8 of the Act and its equivalent art. 5 of Model Law. Section 8 of the Act and the equivalent art. 5 of Model Law is intended to bring certainty to arbitration proceedings by setting out the specific parameters of court assistance or supervision in respect of such proceedings.

[27] The objective of the abovementioned Model Law provision was explained in the Seventh UNCITRAL Secretariat note of 25 March 1985 at pp. 228-229 of Holtzmann and Neuhaus, Guide to the UNCITRAL Model Law on International Arbitration: Legislative History & Commentary, (1994, Kluwer):

> Although the provision, due to its categorical wording, may create the impression that court intervention is something negative and to be limited to the utmost, it does not itself take a stand on what is the proper role of the courts. It merely requires that any instance of court involvement be listed in the Model Law. *Its effect would, thus, be to exclude any general or residual powers given to the courts in a domestic system which are not listed in the Model Law. The resulting certainty of the parties and the arbitrators about the instances in which court supervision or assistance is to be expected seems beneficial to international commercial arbitration.* (emphasis added)

[28] The above position also finds support in cases decided in jurisdictions which have, like Malaysia adopted Model Law as the basis of their arbitral regime. I refer to two such decisions.

[29] In the case of *Mitsui Engineering & Shipbuilding Co. Ltd v. Easton Graham Rush and another* [2004] SGHC 26, the plaintiff had applied to the Singaporean High Court for an interlocutory injunction to restrain the arbitrator from further proceedings. *Mitsui*'s argument was that the court had residual power to grant the interlocutory injunction. The court held that on a construction of the Singaporean International Arbitration Act 1994, which incorporated the UNCITRAL Model Law on International Commercial Arbitration ('the Model Law') Article 5 of the Model

A Law which provided that 'no court shall intervene except where so provided in this Law', the Singapore court had no such residual powers.

[30] A similar position was also taken by the Canadian court on
B the same art. 5 of Model Law in the case of *Western Oil Sands v. Allianz Insurance Company of Canada* [2004] ABQB 79, (Court of Queen's Bench of Alberta). In that case Justice G.C. Hawco held that "it is clear that the inherent jurisdiction of the court may be limited by legislation". In this respect, the learned judge also made
C reference to the views of JB Casey in *International and Domestic Commercial Arbitration (Scarborough Ont.: Carswell 1993*) commenting on the abovementioned art. 5 that:

> ... for a court to have any jurisdiction respecting the arbitration process, it must be found in the relevant Arbitration Act, and not
D in any other Act or rule governing court procedure.

[31] It is noteworthy that like Malaysia, Singapore and Canada have also adopted Model Law as the basis of their respective Arbitration Acts, and therefore the positions taken in those
E jurisdictions may be regarded as useful in construing relevant provisions of the Act.

[32] I will proceed to deal with the cases relied on by learned plaintiff counsel: *Channel Tunnel*, *Innotec* and *Bhatia*'s case and to
F give my reasons as to why they are not good authorities to support the instant application.

[33] In *Channel Tunnel* the House of Lords held that jurisdiction in such matters must be expressly provided by statute but it need not be by the English Arbitration Act 1966. After finding no
G express jurisdiction in the English Arbitration Act 1996 the House of Lords proceeded to derive the source of jurisdictions from s. 37(1) of the English Supreme Court Act. The provision relied on reads as follows:

H > The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

[34] The English position in the case of *Channel Tunnel* may be distinguished in two ways. First, unlike Malaysia, there is no
I written Constitution and the concept of supremacy of the Constitution over other statutes. Second, it is to be noted that

s. 37(1) of the English Supreme Court Act 1981 is very different from our Courts of Judicature Act 1964. The provisions of the Malaysian Courts of Judicature Act 1964 do not confer jurisdiction on the courts to grant injunctive relief in respect of any arbitration proceedings, whether the seat of arbitration is within or outside Malaysia. Section 23(2) of the abovementioned act provides as follows:

> Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction.

[35] In addition s. 25 of our Courts of Judicature Act 1964 provides as follows:

> **Powers Of The High Court**
>
> (1) Without prejudice to the generality of art. 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.
>
> (2) Without prejudice to the generality of sub-s. (1) the High Court shall have the additional powers set out in the Schedule:
>
> > Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

[36] The above provisions reiterates and reinforces the position that the powers and jurisdiction of the High Court is governed by art. 121(1) of the Federal Constitution and is consistent with the *dicta* of Abdul Hamid FJ (as he then was) in the case of *Kok Wah Kuan*. Thus in the instant matter the source of jurisdiction of the High Courts must be derived from the Arbitration Act 2005. This is also consistent with ss. 3 and 8 of the Act as well as the underlying rationale of Model Law which forms the basis of the Act.

[37] With all due respect I find myself unable to agree with the learned judge in *Innotech*'s case that, "For there to be an exclusion of jurisdiction, express legislative provision to that effect must be enacted". Where the language of the statute is clear and unambiguous, there is no necessity to state the negative. Thus s. 3 of the Act in providing specific categories where the Act applies, on a plain reading must be construed not to apply to categories other than those expressly provided in the Act. The basis of my learned brother judge's decision was that s. 10 of the Act should be construed widely so as to include the obligation to grant a stay of court proceedings in aid of a foreign arbitration so as to comply with Malaysia's treaty obligations under the New York Convention 1958 (Convention on the Recognition and Enforcement of Foreign Arbitral Awards). However *Innotech*'s case may be distinguished from the instant case as the relevant section under consideration was s. 10 which provides for the power of the court to grant a stay of proceedings pending arbitration. In addition, The New York Convention (also referred to as the Recognition and Enforcement of Foreign Arbitral Awards Act 1958) has been repealed by s. 51(1) of the Act.

[38] I also respectfully disagree with the Indian Supreme Court in *Bhatia International v. Bulk Trading AIR* [2002] SC 1432 which held that although Part I of the Indian 1996 Act explicitly states "This part shall apply where the place of arbitration is in India", it does not expressly provide the contrary *viz*. that it shall not apply outside India. Thus the Supreme Court upheld the granting of interim injunctive relief under the equivalent of our s. 11 of the Act. The reasoning adopted by the Supreme Court is similar to that adopted by Ramly J in *Innotec*'s case. I am of the opinion that the above construction of the Indian Act with all due respect goes further than what the Indian Legislature had intended.

[39] I am of the opinion that jurisdiction of the High Court in the instant matter must be expressly provided by statute. The High Courts has not been expressly provided under the Act or any federal law, with the jurisdiction to grant the relief sought by the plaintiff.

No Inherent And Residual Powers

[40] Does the High Court have inherent jurisdiction or residual powers to grant relief sought in the instant matter? What is the nature of inherent jurisdiction? Where does one find the source of the court's inherent jurisdiction?

[41] Jeffrey Pinsler in his article, *"The Inherent Powers of the Court"*, Singapore Journal of Legal Studies [1997] pp. 1-49 at p. 10 was of the opinion that:

> The word 'inherent' suggests that the powers arise from the status and role of the court itself rather from an external vesting source such as statutory law. This conclusion can be justified on the basis that the court must have a general or residuary source of powers beyond the confines of procedural rules to ensure that it has the appropriate authority to deal effectively with the abuse of its process, and that justice is never compromised by the inadequacy of written law.

[42] He went on to quote Lord Morris in the case of *Connelly v. DPP* [1964] AC 1254 on the role of inherent powers in the administration of justice.

> There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.

[43] Plaintiff counsel argued that jurisdiction of the High Court is derived from O. 92 r. 4 of the Rules of the High Court 1980 and referred to the *dicta* in *Bina Jati* as support. I respectfully disagree. I am of the opinion that O. 92 r. 4 of the Rules of the High Court 1980 does not vest inherent jurisdiction in the High Court to grant injunctive relief in the instant matter.

[44] Order 92 r. 4 of the Rules of the High Court 1980 provides thus:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

[45] The above should be construed as a declaration of the court's inherent powers rather than its vesting source. It was clearly laid down by the Federal court in *R. Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 where Edgar Joseph Jr FCJ stated that:

> Order 92 r. 4 is a unique rule of court for while it neither defines nor gives jurisdiction, yet it serves as a reminder and confirmation-lest we forget-of the common law powers of the court, which are residuary or reserve powers and a separate and distinct source of jurisdiction from the statutory powers of the court. In other words even without Order 92 rule 4, the inherent powers of the High Court would still be there.

[46] In *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd.* [1982] 1 LNS 34 the Federal Court which considered the power of the court to grant *Mareva* injunction concluded that such power lay in statute, namely para. 6 of the Schedule to the Courts of Judicature Act 1964 which substantially corresponded to s. 45 of the English Supreme Court of Judicature (Consolidation) Act 1925. The Federal Court made no reference to O. 92 r. 4 or the inherent powers of the court.

[47] Authorities have held that the abovementioned order is only a procedural rule and is not intended to confer or affect substantive rights (*Tan Beng Sooi v. Penolong Kanan Pendaftar (United Merchant Finance Bhd Intervvener)* [1995] 2 CLJ 846; *Winerich Sdn. Bhd. v. Alpha Atlas Management Sdn. Bhd.* [2003] 7 CLJ 259 HC. It therefore forms part of procedural but not substantive law. Sir Jack Jacob QC in his article, '*The Inherent Jurisdiction of the Court*' [1970] Current Legal Problems 23, pointed out that:

> The inherent jurisdiction of the court is exercisable as part of the process of the administration of justice. It is part of procedural law, both civil and criminal, and not of substantive law; it is invoked in relation to the process of litigation.

[48] To construe O. 92 r. 4 as providing a blanket jurisdiction in all procedural as well as substantive matters would be to go further than it was intended and would run contrary to the authorities abovementioned.

[49] In addition, as discussed heretofore, s. 8 of the Act clearly excludes inherent jurisdiction or residual powers of the court. Learned counsels referred this court to two conflicting Court of Appeal decisions on the matter of the inherent jurisdiction of the courts in arbitration matters: *Sarawak Shell Bhd v. PPES Oil & Gas Sdn Bhd & Ors* [1998] 3 CLJ 275 and *Bina Jati Sdn Bhd v. Sum Projects (Brothers) Sdn Bhd* [2002] 1 CLJ 433. In the case of

Sarawak Shell Bhd., Mahadev Shankar JCA held that the High Court had no non statutory power to intermeddle in arbitrations whether by way of inherent jurisdiction or at common law. This is contrary to the *dicta* in *Bina Jati* where the court held *albeit obiter*, that the High Court can invoke its inherent powers under O. 92 r. 4 of the Rules of the High Court to make any order as may be necessary to prevent injustice and this included a power to intervene in arbitration proceedings. With all due respect, I am of the opinion that the decision of *Sarawak Shell* is to be preferred as it is consistent with the recent Federal Court decision of *Kok Wah Kuan* as well as ss. 3 and 8 of the Act. It is also supported by the English House of Lords decision of *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp Ltd, The Bremer Vulkan* [1981] 1 Lloyd's Rep 253 which the Court of Appeal in *Sarawak Shell* cited with approval. The House of Lords held: (i) On a true construction of s. 12(6)(b) of the Arbitration Act 1950, there is no power to grant interim injunction in respect of a foreign arbitration; (ii) English courts have no inherent supervisory power more extensive than that conferred by the Arbitration Act.

[50] Thus I am of the opinion that on the basis of the abovementioned authorities, the High Court has no inherent or residual powers to intervene in arbitration matters where the seat of jurisdiction is outside Malaysia.

Agreement Cannot Confer Jurisdiction

[51] It is also clear that such jurisdiction of the courts cannot be conferred by the agreement of parties, whether as a specific clause in an arbitration agreement or as an article under Model Law incorporated into the aforesaid agreement. In the Court of Appeal case of *Inter Maritime Management Sdn Bhd v. Kai Tai Timber Company Ltd.* [1995] 4 CLJ 164 Gopal Sri Ram in considering an agreement held that:

> the court is not bound to give effect to such an agreement since consent cannot create or confer jurisdiction upon a court that has none ...

[52] Conversely, parties cannot by agreement oust the jurisdiction of the court, if such jurisdiction exists. The case of *ISC Technology Sdn. Bhd v. Premium Systems Technology Pte. Ltd* [2008] 7 CLJ 239 is an authority in point.

[53] Such provisions are in essence 'enabling' provisions in that they enable parties to the agreement to seek recourse in courts which are invested with the jurisdiction to provide relief. Model Law itself does not and cannot confer jurisdiction on courts. The Malaysian Arbitration Act 2005 also provides 'opting in' or 'opting out' provisions (ss. 3(2)(b), 3(3)(b) and 3(4) of the Act) in keeping with the modern trend towards party autonomy in the field of arbitration.

No Prejudice To Plaintiff

[54] I am not persuaded by learned plaintiff counsel's argument that the above determination by this court would prejudice the plaintiff. The plaintiff is not without remedy. His recourse is the Singapore courts, where the seat of arbitration is situated. The Singapore courts have jurisdiction under s. 12(7) read with s. 12(1) of the Singapore International Arbitration Act 1994. I do not accept the plaintiff's argument that as the defendants are Thais any order granting the plaintiff injunctive relief would be ineffective against the defendants. As the parties have already agreed to have the matter arbitrated in Singapore, Singapore courts would be the more effective forum. Recourse to courts of the chosen forum would also reinforce the intention of parties to submit their disputes to a forum that is neutral to both parties.

[55] It must be understood that Model Law is not against court intervention. The rationale behind Model Law is to draw clear parameters of the court's intervention in arbitration proceedings. Far from being 'arbitration unfriendly', the provision of specific and clear instances of court intervention provides certainty, as well as respecting party autonomy in the election of the seat of arbitration, as well as the powers of arbitrators, which, rather than projecting Malaysia as 'arbitration unfriendly', (as feared by plaintiff counsel) is on the contrary, consistent and supportive of international commercial arbitration. I am persuaded that in adopting Model Law as the basis of the Malaysian Arbitration Act 2005 Parliament was fully cognizant of this fact.

Conclusion

[56] In conclusion, at some point Parliament may in its wisdom adopt the equivalent of art. 1(2) of Model Law to expressly provide for the jurisdiction of the courts in matters where the seat of jurisdiction is outside Malaysia, by setting out clear parameters

of the courts power to grant *inter alia* injunctive relief as well as assistance in enforcing arbitral awards, along the lines adopted by jurisdictions which have similarly adopted Model Law as its basis eg, s. 7 of the New Zealand Act. As it stands the intention of Parliament is clear. Such jurisdiction is not provided for under the Act or in any other statute. It is not for the courts to clothe itself with powers where none has been conferred by Parliament. To do so would be a transgression of legislative power. I am also of the opinion that this matter does not fall within the realm of matters where inherent or residual powers of the court may be invoked. I am of the opinion that this court lacks the jurisdiction to grant the relief sought by the plaintiff.

[57] I therefore dismiss with costs the plaintiff's application for an injunction in encl. (1).